NO. 21686
NO. 21686-A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

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I

JURISDICTION AND STATEMENT OF THE CASE

Appellants and appellee are in agreement on these subjects.

II

STATEMENT OF FACTS

Appellants take serious issue with appellee's statement of facts. It is well done, but it does not constitute a statement of facts. It is an ill-disguised, extremely argumentative discourse, laden with conclusions, and as such is misleading. The opening sentence is illustrative as it says that Count One of the Indictment

"factually concerns the deposit of heroin by Romero in a public telephone booth on May 10, 1966." Appellee's entire brief takes on this same tone - that appellants are guilty and now we must be bothered by showing how the proof of their guilt satisfies the sticky, hyper-technical requirements of the law as set down by appellate courts.

There are numerous serious constitutional questions involved in this case, and appellee does not aid the quest for solutions by the assertion of the infallibility of their conclusion, which is being challenged on numerous constitutional grounds.

Appellee's technique is to assume that a fact is established and then repeat it over and over again. This Court should not be deceived by this tactic. For example, on page 4, appellee twice states that two totally anonymous letters "identified the narcotics violator" as Romero. This technique, whether subtle or not, should be exposed.

These three totally anonymous letters can never be elevated into anything more than investigative leads. Nothing appellee says about them will convert them into evidence of guilt or evidence of probable cause to arrest. Anonymous hearsay cannot be partially corroborated and then relabeled probable cause; the corroboration itself must constitute the probable cause in such situations

The "Areyano - Arrellanes" names, as tortuously presented by appellee as being the same name, is an invitation to scorn. Appellee in a statement of facts states that a double "LL" is pronounced "I" in Spanish; therefore, these names are the same. Appellee's cited authority is the testimony of Agent Irving Lipschutz, who testified that this is what Spanish-speaking agents told him [R.T. 108]. Hardly expert testimony, but even if it is true it does not account for the double "RR" in one name and the single "R" in the other, or the "O" ending in one name and the "ES" ending in the other name. Appellee offers no explanation of the fact that Arrellanes is Romero's wife's maiden name [R.T. 75], or that the person or persons who caused this problem was the Spanish-writing, anonymous "Juan Sanchez."

All of the statements about telephone calls being made are hearsay. Not one telephone record was produced as an exhibit in court. An agent testified that he examined telephone records (which were not produced) and he was able to determine that "Romero was calling individuals, who are of record in our office files ..." [R.T. 80]. Absenting a wire-tap, and appellants have no evidence of any in this case, it is impossible to examine telephone toll records of calls made from a given telephone number and conclude who was calling on that telephone and who answered the telephone.

The attempt by appellee to elevate multiple hearsay opinion testimony into facts or probable cause is apparent in reference to Charles Toliver. An agent is testifying about information that was relayed to him which originated from an unknown informant whose reliability is totally unknown and whose basis of information is never given, and this is offered as probable cause. Appellee blithely states (p.6) that "an informant of the San Francisco office of the Federal Bureau of Narcotics stated that ..." and a citation to the transcript is given. The truth of the matter is that a Los Angeles agent testified that he had been told over the telephone by agents in San Francisco (unidentified) that an informant (unidentified) had told them ...[R.T. 91]. The point is made.

Appellee, under the heading of "Facts and Circumstances Within the Agents' Knowledge Prior to Arrest of David Romero," discusses (p.6-7) the contents of Tickle's confession which was obtained almost three months after Romero's arrest.

Appellee mentions that over thirty surveillances were maintained on Romero in the four months prior to his arrest, and concludes that these surveillances "disclosed a pattern of Romero stopping at the Tickle residence prior to proceeding to his ultimate destination" (p.7). This is mere words served up with a sinister

suggestion. What does "ultimate destination" mean? The plain facts are that even though Romero was under surveillance for months, the agents never acquired a single shred of evidence of any wrongdoing on his part. Appellee would intimate that finding nothing means there is something there and this is the fatal defect to pre-conceived conclusions.

Appellee suggests in the statement of facts that if a person leaves a place that has a telephone and passes many available telephones and then enters a telephone booth, this means that the person had a reason for picking a particular telephone. Not only is this not a fact but it would make every daily occurrence suddenly suspect.

Appellee states (p.8) that "The sole act performed by David Romero within the telephone booth was a motion of his arm at the level of the counter which extended under the telephone [R.T. 167-168]." Not only does the citation fail to support this statement, but it is erroneous and incomplete. Appellants set forth in their opening brief (p.20-21) all of the actual testimony on this subject as well as the trial court's summary that the agent "could not see what he did with his hands." It is important to note that "a motion of his arm" is of no value as it tells a trier of fact nothing. It would be peculiar if a person didn't move his arms but held them

rigidly at his sides.

Appellee states a number of times that when the agent entered the phone booth he found a package of heroin (p.8,9). This is not accurate within the framework of this case. The agent, at the most, found a tin foil package containing a powder of unknown substance. For all he knew then and there it could have been plain milk sugar. The point is that the agents at the time of arrest did not know what they had in the tin foil package.

The factual circumstances of the arrest and beating of Romero were contraverted during the trial. Two disinterested witnesses were at the scene and their testimony contradicts the agents. Mrs. Zimmer testified that once Romero's car spun around and stopped it never moved again [R.T. 238-239]; and after the agent shot out the tire, Romero started to get out of his car and he got one leg out when the agent began hitting Romero with something [R.T. 234-235]. Manuel F. Alger testified that he observed the entire incident, and after the agent shot out the tire the agent hit Romero with his gun, and that there was no fight or struggle but the agent just hit him and he could hear the sound of the blow [R.T. 240-242] Mr. Alger also testified that once Romero's car spun to a stop it never moved again [R.T. 243].

Appellee sets forth no facts relative to Romero' physical condition after being smashed over the head with

a gun.

Regarding Tickle's bond reduction after his second arrest, appellee states (p.12) that "during the evening of August 3, 1966, there was no mention of bail or bond reduction." This is not so. Agent Lipschutz testified on direct examination that he discussed bond reduction with Tickle immediately after Tickle's arrest on the evening of August 3, 1966 [R.T. 529,532]. Appellee also states that Tickle's bond reduction was mentioned on August 4, 1966, while the confession was being typed (p.12), suggesting or implying that this was the first time the subject was raised on August 4, 1966. This is not so. On August 4, 1966, after Agent Lipschutz took Tickle from the jail, the very first thing he did was to make arrangements to reduce Tickle's bail and this was prior to any typing of the confession [R.T. 426, 529].

III

ARGUMENT

A. Romero's arrest was not based on probable cause.

Appellee sets forth twelve points and contends they add up to probable cause. Appellants' opening brief deals with these points in detail and this argument will not be repeated. If we stop after appellee's eighth point and ask does this add up to probable cause that Romero

put narcotics in a telephone booth on May 10, 1966, there is only one possible answer: No. These first eight points at the most form a basis of suspicion or a reason to investigate. Appellee's error is to treat "probable cause" as if it has an independent existence, which it doesn't. The actual test is whether there is probable cause to believe a specific crime has been committed. The probable cause aspect must be connected to a crime.

Appellee's eighth point is not clear as it starts off by saying: "This information was corroborated by information ..." (p.15). What information was corroborated? Is it appellee's position that the anonymou "Juan Sanchez" is an informant that has been corroborated by independent investigation so that his allegations now constitute a probable cause? This is factually not so because a six-month investigation and over thirty surveillances did not corroborate the allegations of criminal conduct. This is also legally impossible because his allegations in September of 1965 have nothing to do with narcotics in a telephone booth in May of 1966. The crime for which the government must establish they had probable cause to arrest anyone had not been committed. These same observations are true as to the informant in San Francisco. There is not a single shred of evidence that indicates that this informant

is reliable or that he has any basis for his conclusion.

The agents did not attempt to secure an arrest warrant, and no explanation is offered for this failure. The agents had had Romero under surveillance for six months; they knew him, his habits, his home, his relatives, his telephone, his cars, his past, and his finances. They could have waited and chemically tested the powder, and checked the tin foil for fingerprints. They normally wait in such circumstances to see who comes to the booth next. It is suggested that they didn't wait here because they did not see Romero place anything in the booth.

The Supreme Court in Wong Sun v. U.S., 83 S.Ct. 407, 371 U.S. 471 (1963), in affirming this Court's determination that an arrest lacked probable cause, said:

> "It is conceded that the officers made no attempt to obtain a warrant for Toy's arrest. The simple fact is that on the sparse information at the officers' command, no arrest warrant could have issued consistently with Rules 3 and 4 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503. The arrest warrant procedure serves to insure that the deliberate, impartial

judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."

If appellee has probable cause to arrest Romero for narcotics in the telephone booth on May 10, 1966, it comes from appellee's points 9 through 12 (p.15-17). Briefly stated, these points amount to the fact that Romero went into a telephone booth which had not been previously searched or watched, did not make a telephone call, and an agent then went into the booth and found a tin foil package under the telephone, which contained a powder. It was then that the agents decided to arrest Romero. It was then that they had to have probable cause that Romero had placed this powder in the booth. Appellant submit that the requisite probable cause was lacking.

Tin foil will take and hold fingerprints. Romero's fingerprints are not on the tin foil.

Appellee asserts that flight from law officers is evidence of guilt and the cases hold that the flight of an accused is evidence of consciousness of guilt. But this is not to say that it is probable cause, particularly where the conduct is ambiguous as it is here. In Wong Sun (supra) the Supreme Court affirmed this Court's decision that Toy's flight from narcotic agents did not constitute probable cause for his arrest. See particularly footnote 10 (p.415) of the Supreme Court's decision where it is stated: "... we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."

See also Taglavore v. U.S., 271 F.2d 262 (9th Cir. 1961).

Probable cause to arrest a person for a specific crime depends on the facts and circumstances in each case, and appellants submit that in this case there was no probable cause to arrest Romero.

B. Admissibility of Romero's statements.

It appears that appellee basically confesses error on this point, as appellee states: "The warnings [given to Romero after his arrest] were legally adequate at the time given but not legally adequate at the time of trial" (p.20). These legally inadequate warnings render Romero's statements inadmissible for any and all

purposes including in the search warrant and as a part of the probable cause to arrest.

Appellee attempts to avoid the legal conclusion of inadmissibility by saying the statements were volunteered to the agent at the gas station. Appellee would ignore the chronology. Romero was not arrested at the gas station; he was slugged, handcuffed with his hands behind his back, put into the back seat of his own car, given an admitted inadequate warning, driven four blocks to a gas station, and then spoke to the agent in charge who also gave him an admitted inadequate warning. He was then kept prisoner for several hours without being taken before the Commissioner while an agent went to the Commissioner and secured a search warrant. Then he was taken into Tickle's home and made statements there that appellee would characterize as volunteered.

Appellee's quote from Miranda v. Arizona, 384 U.S. 436, 478 (1966), obviously does not apply to the instant facts. Romero did not walk into the agents' offices and confess. A trier of fact is obligated to consider the character of the testimony, the surrounding circumstances, the motive of a witness, the inherent logic of the testimony, and it taxes credulity to accept that the agent in charge gave Romero a warning and then Romero, handcuffed and bleeding, blurted out a confessior

and the agent never asked a question.

The cases cited by appellee (p.21) are pre Miranda cases and are distinguishable on the facts.

Appellee apparently concedes that if Romero's arrest was illegal then any statements attributed to him would be inadmissible for all purposes.

Although the evidence as to whether it was necessary for the agents to beat Romero over the head with a gun is in sharp conflict, there is no conflict over the facts that Romero was beaten and bled profusely. A man in this shape who is then put in a car with his hands cuffed behind his back is not generally in either physical or mental condition to freely and voluntarily confess. Appellee had and has the burden of proving that Romero's statements were freely and voluntarily made, and there was a total failure of proof. This entire area of the law is, of course, further complicated by the Miranda decision in that it must be determined if even an adequate warning was heard and comprehended by a beaten and bleeding man.

Appellee's attempts to avoid the mandate of Mallory v. U.S., 354 U.S. 449 (1957) fly in the face of the plain facts that an agent present at the scene of the arrest went to a United States Commissioner and secured a search warrant in which post arrest statements of the arrestee were used, but the arrestee was not brought

before the same Commissioner. Once the agent knew that the Commissioner would hear the agent couldn't the agent have utilized the same radio to tell the other agents to bring in Romero for arraignment. Of course he could have, but he didn't want Romero arraigned. Why didn't the Commissioner order the agent to bring Romero before him immediately? Why didn't the agent in charge send Romero in with the agent who was to seek out the Commissioner? The answers to these questions permit only one conclusion: Romero was denied his right of prompt arraignment.

Appellee suggests that Romero's statement at the gas station is merely a "threshold statement," but the facts are to the contrary.

Appellee also strains credulity by suggesting that Romero's statements several hours after his arrest and while he was in Tickle's home were volunteered and were merely corroborative and cumulative. Are they also threshold statements? Patently not. They were statement made by an arrestee hours after his arrest, who had not been arraigned before a Commissioner who was available. And these same statements were used to convict Romero of separate and distinct offense (Count Two), so how can they be corroborative or cumulative of statements relative to a different offense.

C. The search warrant is legally invalid.

Appellee's confession of error, that the agents did not give Romero a legally adequate warning but then used a statement obtained from him as part of their probable cause to secure a search warrant, should be determinative of this point in appellants' favor.

Although the trial court indicated that it felt that Romero had no standing to object to the search warrant [R.T. 262-263], appellee does not pursue this point and obviously concedes that Romero has standing. Insofar as the trial judge sustained the search warrant on grounds that Romero had no standing to object, the trial court of course must be reversed.

Appellee's answer to the specification of error that the search warrant is legally defective on its face is to charge appellants with being hypertechnical and of applying technical requirements of elaborate specificity. Yet appellee admits that a number of defects do exist in the search warrant. Appellee's analysis of other alleged defects in the search warrant is shallow as it assumes the existence of the facts that must be proven and attempts to explain mistakes of fact by saying they were "reasonable conclusions."

Appellee offers no explanation or argument for the wrong dates appearing on both the search warrant and the affidavit for the search warrant. Nor does appellee

comment on: (1) the failure to state that the anonymous letters were received six months before the application for the search warrant; (2) the failure to reveal that Romero was Tickle's landlord and that Romero and Tickle were related; and (3) that Romero's wife was an "Arrellanes

Appellee states (p.29) that the informant regarding the Toliver allegation was credible because corroborated. This is wishful thinking. In the affidavit for the search warrant not only is there no corroboration offered but there is no basis given for the informant's opinions. If a person had narcotics in Oakland, California in December, this is of no value in ascertaining if he has narcotics in Los Angeles the following May. The test is whether there is probable cause that there are narcotics at a certain location now.

Appellee states (p.30) that it is reasonable to conclude that Manuel Arrellanes is Manuel Areyano, which is really farfetched, but even this does not explain the factual falsity in the affidavit.

Appellee's quotation from Porter v. U.S., 335 F.2d 602 (9th Cir. 1964), about an affidavit prepared by a police officer without the assistance of counsel only serves to emphasize the gravity of the defects in the instant search warrant, because here there was assistance of counsel. Agent Lipschutz testified he met with Assistant United States Attorney John

Van de Kamp [R.T. 132] and Mr. Van de Kamp's initials appear on the bottom of the search warrant [C.T. 51].

It is worth noting that appellee quotes a case for the proposition that doubtful cases should be resolved in favor of warrants because the law prefers warrants, but why not apply this same proposition to Romero's arrest. He was arrested without a warrant.

D. Tickle's confession is inadmissible.

Appellee's answer to the charge that Tickle's confession was obtained by denying Tickle's right to counsel is to state that Tickle waived counsel. When a person has been arrested and has had a judicial proceeding at which he has counsel who has filed an appearance, it is thereafter up to a court to determine if counsel has been discharged. It is certainly not the function or duty of an agent in such circumstances to decide that counsel has been substituted out and the person is his own lawyer.

Why did the agents re-arrest Tickle if not to question him in the absence of his counsel, which is exactly what happened.

Appellants, in their opening brief, specified and argued that Tickle's confession should be held inadmissible because of appellee's tactics which denied Tickle due process. Nowhere does appellee respond to this argument. This silence can only be interpreted

as an agreement with appellants' position.

E. The evidence is insufficient to sustain the verdicts.

Appellee argues that there is a reasonable inference that Romero had had possession of the narcotics found in the telephone booth. This is not so. At the very most the government evidence shows that Romero was in a phone booth in which narcotics were subsequently found. No one ever saw any narcotics in Romero's possession; no one even saw a package in his possession. Appellee's cases are easily distinguished.

Three very recent cases from this court are quite pertinent.

Hill v. U.S., 379 F.2d 811 (9th Cir. 1967);

Beckett v. U.S., 379 F.2d 863 (9th Cir. 1967);

Davis v. U.S., 382 F.2d 221 (9th Cir. 1967).

In each of these cases the conviction was reversed because the government had failed to prove that the appellant had possession of the narcotic. The Davis case is very much in point and as applied to the instant case the fact that the telephone booth had not been searched before Romero entered it seems to be conclusive that this case must be reversed.

IV

CONCLUSION

Appellants respectfully urge this Court to

reverse the convictions with directions to dismiss the indictment.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas R. Sheridan

THOMAS R. SHERIDAN